



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Eastern Maintenance and Services, Inc.

File: B-229734

Date: March 15, 1988

DIGEST

1. Protester's objection to solicitation clause requiring a pledge of assets from each person acting as an individual surety on a bid guarantee is dismissed as untimely. A protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to bid opening.
2. Although an agency may allow a prospective awardee a reasonable time period after bid opening to cure a problem related to responsibility of a surety under a bid bond, it is not obligated to delay award indefinitely while the bidder attempts to cure the problem.

DECISION

Eastern Maintenance and Services, Inc. protests the rejection of its bid under invitation for bids (IFB) No. GS-11P87MJC0121, issued by the General Services Administration (GSA) for security guard services at two federal office buildings in Washington, D.C. The contracting officer rejected Eastern Maintenance's bid because the firm failed to furnish pledges of assets from the individuals acting as sureties on its bid guarantee within a reasonable period of time after bid opening. We dismiss the protest in part and deny it in part.

The IFB required a bid guarantee of 20 percent of the bid price. Eastern Maintenance, the low bidder, submitted a bond with a penal amount of \$122,202 listing two individual sureties. Each surety had completed an affidavit of individual surety (Standard Form 28) disclosing his assets and liabilities and the other bonds on which he was a surety; neither, however, had complied with the solicitation requirement that each individual surety submit a pledge

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of assets in the form of evidence of an escrow account containing commercial and/or government securities and/or a recorded covenant not to convey or encumber real estate. In addition, neither surety had submitted a current certified, audited financial statement as required by the IFB.

A GSA employee telephoned Eastern Maintenance on November 2 and informed the firm's president that he would have until the close of business on November 9 to submit the pledges of assets. A letter confirming the November 9 deadline was mailed to Eastern Maintenance on November 3 and received by the protester on November 7. On November 9, GSA again telephoned Eastern Maintenance's office to check on the requested information and left a message for the firm's president, who was out of the office at that time, to contact the agency. Although Eastern Maintenance had not requested it, the contracting officer decided that he would allow the firm a grace period of an additional week to submit the pledges. On November 17, having not received neither the missing information nor a return telephone call from Eastern Maintenance's president, the contracting officer determined that the bid bond was unacceptable because he could not conclude that the individual sureties were financially responsible.

Three days later, GSA received from each surety a pledge of assets in the form of a covenant not to convey or encumber real estate. Since he had not yet made award to another bidder, the contracting officer reexamined his determination in light of this new evidence. His examination revealed that one of the sureties had submitted a covenant on property not listed on his affidavit of individual surety. Without information as to the value of the property, the contracting officer was unable to determine that the surety had pledged assets in the amount of the penal sum of the bond. In addition, one of the two tracts of land pledged by the surety appeared to the contracting officer to be encumbered already, leading the contracting officer to conclude that he could not accept the covenant on the property without a title search to provide evidence of clear title.

At this point, the contracting officer concluded that insufficient time remained before the contract start date to permit further delay to establish the acceptability of Eastern Maintenance's sureties. He therefore declined to revoke his previous decision and, on November 25, awarded a contract to Guardian Security Agency, Inc., the second low bidder.

Eastern Maintenance argues that the requirement for a pledge of assets is inconsistent with the Federal Acquisition Regulation, which does not require such pledges, and with previous GSA solicitations which have not included such a requirement and complains that it was not provided reasonable time within which to supply the necessary pledges.


We will not consider the protester's first argument because it is untimely. A protest such as this based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987). Any objection that Eastern Maintenance had to the pledge of assets requirement should have been raised prior to bid opening.

Eastern Maintenance also argues that it was not given adequate time to respond to the contracting officer's request for pledges from its sureties. The protester contends that there was insufficient time between its receipt of the contracting officer's letter on November 7 and the requested date of compliance, November 9, for it to respond. Eastern Maintenance also maintains that the contracting officer led it to believe that he would not strictly adhere to the November 9 deadline so long as it submitted the pledges within a reasonable time.

An agency may, in its discretion, allow a prospective awardee a reasonable time period after bid opening to cure a problem related to the responsibility of its sureties since contract award and not bid opening is the critical time for determining such matters. Transcontinental Enterprises, Inc., B-225802, July 1, 1987, 66 Comp. Gen. ___, 87-2 CPD ¶ 3. It is not, however, required to delay award indefinitely while a bidder attempts to cure the problem. Instruments & Control Service Co., B-224293, Nov. 18, 1986, 86-2 CPD ¶ 581, reversed on other grounds, B-224293.2, Feb. 17, 1987, 87-1 CPD ¶ 170. Here, the record indicates that the contracting officer did allow the protester a reasonable period of time to furnish the pledges of assets. Although Eastern Maintenance did not receive the contracting officer's letter until November 7, it had already been informed of the November 9 deadline by telephone on November 2, and thus had a full week between the notification and the deadline to comply. In addition, the contracting officer allowed Eastern Maintenance a 1-week grace period before finding it nonresponsible. Moreover, if the protester objected to the amount of time allowed to respond, we fail to understand why he did not make an objection to the contracting officer prior to submitting the information requested.

In any event, when the contracting officer finally received the pledges of assets from the protester's sureties, he did consider them, despite the fact that they were late. He concluded, however, that one of the pledges was unacceptable as submitted and that insufficient time remained before the contract start date to permit further delay to establish the surety's responsibility. The protester does not dispute either the contracting officer's conclusion concerning the adequacy of the pledge of assets or his view that the contract start date would not permit further delay. Under the circumstances, we have no basis upon which to object to the contracting officer's determination not to delay award further to allow Eastern Maintenance to cure the defects in its surety's pledge of assets.

The protest is dismissed in part and denied in part.



for James F. Hinchman
General Counsel